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No. 90-1850

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1990

JOSE M. PERALES,

Petitioner,

against

MABSTOA and NEW YORK CITY TRANSIT AUTHORITY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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NYC 212-732-6978 Westchester 914-681-1322 Long Island 516-222-0221
(6431—LC3-719)

Counter Statement of Question Presented

No counter statement is required since the question presented by petitioner is not germane to the decision of the Second Circuit Court of Appeals.

Table of Contents.

	Page
Counter Statement of Question Presented	i
Table of Contents	ii
Table of Authorities	iii
Counterstatement of Jurisdiction	2
Counterstatement of Constitutional and Statutory Provisions Involved	2
Counterstatement of the Case	2
Reasons for Denying the Writ	3
CONCLUSION. The petition for writ of certiorari should be denied	5
APPENDIX:	
Exhibit I—Summons in a Civil Action	6
Exhibit I (Continued)—Complaint	7

TABLE OF AUTHORITIES.

Page

CASES:

Johnson v. Transportation Agency, Santa Clara Cty., 480 U.S. 616, 107 S.Ct. 1442, 94 L.Ed.2d 615 (1987) 5

McDonnell Douglas v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973) 3

Newsday, Inc. v. Long Island Typographical Union No. 915, CWA, AFL-CIO, 915 F2d 840 (CA2, 1990) 4

STATUTES:

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000-e 2

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OCTOBER TERM, 1990.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Respondents MABSTOA and New York City Transit Authority respectfully request that this Court deny the petition for Writ of Certiorari in this case seeking review of the decision of the United States Court of Appeals for the Second Circuit.

Counter Statement of Jurisdiction

Petitioner erroneously claims that this Court's jurisdiction is invoked under Title 28 USC §§41, 1921-94.

Counterstatement of Constitutional and Statutory Provisions Involved

There are no constitutional provisions involved. The only relevant statute is Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000-e.

Counterstatement of the Case

Petitioner initiated this action on July 16, 1987 alleging employment discrimination, based on national origin, in violation of Title VII of the Civil Rights Act of 1964. (A copy of petitioner's Summons and Complaint is submitted herewith as Exhibit 1 in respondents' Appendix).

The case was ultimately tried without a jury on April 16, 1990, the court subsequently rendering its decision and order on May 10, 1990. (Lower court decision is annexed to the Petition as Appendix B).

In its decision, the district court examined the petitioner's employment history and traced the chronology of events which resulted in petitioner's discipline and ultimate dismissal. The court examined and rejected petitioner's claim of discriminatory treatment because he is Hispanic, concluding that it could not "find a nexus" between the events which petitioner alleged were the impetus of his claim of discrimination and "what followed in the next four years during the course of (petitioner's) employment." The petitioner failed to sustain his claim. (Petition Appendix B-5).

On appeal, the Court of Appeals for the Second Circuit ruled that petitioner failed to prove the four elements needed to establish a prima facie case of discrimination as set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973) and thus failed to make out a prima facie case of discrimination. (Court of Appeals decision is annexed to the Petition as Appendix A).

Reasons for Denying the Writ

The petition does not challenge the decision below which held that petitioner failed to prove the requisite four elements necessary to establish a prima facie case of discrimination. Holding that a petitioner must prove these four elements, as set forth by this Court in *McDonnell Douglas v. Green*, 411 U.S. 792 (1973), in order to establish a prima facie case of discrimination, the decision below should not be subject to further review. There is no conflict among the circuits on this issue, as the standard is established by a decision of this Court, and no occasion for further review.

Petitioner does not challenge any portion of the Court of Appeals' decision but, instead, erroneously attempts to use this petition to seek to have this Court hear an untimely challenge to a 1986 arbitral decision upholding his termination from employment. Petitioner never sought to vacate the Arbitration award in state court or in his district court complaint.

Petitioner seeks to challenge the arbitration award based on his mistaken belief that the District Court predicated its decision on the 1986 arbitration award. (Petition at p. 3). A reading of the District Court decision, attached to the Petition as Appendix B, dispels petitioner's erroneous assumption. The District Court (Metzner, J.) made only passing reference to the arbitration award upholding MABSTOA's

decision to dismiss petitioner (Petition Appendix B-5) and then went on to state:

> The genesis of plaintiff's claim of discriminatory action because he is Hispanic, appears to be the posting in August, 1981, by the union of a list at the garage naming twelve people who did not contribute $5 to a fund to be used to pay the expenses of the Local's representatives at the annual convention in California.
>
> Plaintiff states that he and another employee listed were Hispanics, and that the two of them ultimately were discharged. There is no proof as to the basis of the dismissal of the other Hispanic. In any event, the listing of the delinquents was not an action of the defendant. It was an action by plaintiff's own union which represented him through all of the grievance procedures outlined above. I cannot find a nexus between the listing and what followed in the next four years during the course of plaintiff's employment.
>
> I find that on the record before this court plaintiff has failed to sustain his claim.
>
> (Petition Appendix at B5 and B6)

The issues raised in the instant petition regarding the constitutionality of the arbitration award, the arbitration's underlying issue of petitioner's refusal to take a drug test, and the issue of whether or not a court has the authority to vacate an arbitration award, which were not issues before or decided by the Court of Appeals, bear no relationship to petitioner's claim of national origin discrimination. Likewise, petitioner's citing of *Newsday, Inc. v. Long Island Typographical Union, No. 915, CWA, AFL-CIO*, 915 F2d 840 (CA2, 1990), which deals with the court's authority to

vacate an arbitrator's award, is totally irrelevant and inapplicable to the discrimination issues decided below.

The only issue raised and decided by the proceedings below was whether petitioner was discriminated against because of his Hispanic national origin. It is respectfully submitted that this Court decline to address any issues, constitutional or otherwise, not raised or addressed in the litigation below. See, for example, *Johnson v. Transportation Agency, Santa Clara Cty.*, 480 U.S. 616, 620 n.2, 107 S.Ct. 1442, 94 L.Ed.2d 615 (1987).

CONCLUSION

The petition for writ of certiorari should be denied.

Dated: Brooklyn, New York
June 24, 1991

Respectfully submitted,

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EVELYN JONAS*
DANIEL LAWRENCE TOPPER
Of Counsel

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APPENDIX

Exhibit I—Summons in a Civil Action.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

JOSE PERALES

v.

MABSTOA.

Case Number: 87 CIV. 5057

TO:

YOU ARE HEREBY SUMMONED and required to file with the Clerk of this Court and serve upon Plaintiff's Attorney, *Pro Se* Jose Perales, 558 East 191 Street, Bronx, New York 10458, an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Raymond F. Burghardt, Clerk Jul 16 1987

By Deputy Clerk Illegible

Exhibit I (Continued)—Complaint.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

JOSE M. PERALES, 849 Manida St., Bronx N.Y. 10474

v.

MABSTOA, N.Y.C Transit Authority, 370 Jay Street, Brooklyn, N.Y. 11201

COMPLAINT AND MOTION FOR OTHER RELIEF

1. This action is brought pursuant to Title VII of the Civil Rights Act of 1964, as amended, for employment discrimination. Jurisdiction is specifically conferred on this Court by 42 U.S.C. § 2000e-5. Equitable and other relief are also sought under 42 U.S.C. § 2000e-5(g). Jurisdiction is also based on 42 U.S.C. §§ 1981 *et seq.* and 28 U.S.C. §§ 1331, 1343.

2. Plaintiff is a citizen of the United States and resides at: 849 Manida St., Bronx, N.Y.C., Bronx, New York, (212) 328-0407.

3. Defendant(s) lives at, or its business is located at: 370 Jay Street, Brooklyn, N.Y.C., Brooklyn, New York.

4. The address at which I sought employment or was employed by the defendant(s) is: East 177 St. Corner Devoe, Bronx, N.Y.C., Bronx, New York.

5. As nearly as possible, the alleged discriminatory acts occurred on: Feb 12, 1982 to present.

6. As nearly as possible, I filed charges with the New York State Human Rights Commission or the N.Y.C. Commission on Human Rights regarding defendant's alleged discriminatory conduct on: ____

7. As nearly as possible, I filed charges with the Equal Employment Opportunity Commission regarding defendant's alleged discriminatory conduct on: April 10, 1982.

8. The Equal Employment Opportunity Commission issued the attached Notice of Right to Sue letter, which was received by me on June 3, 1986.

(Note: Please attach both a Notice of Right to Sue letter and a copy of the charges to the Equal Employment Opportunity Commission to this Complaint.)

9. The acts I complain of in this suit, concern:

A. Failure to employ me.

B. X Termination of my employment.

C. Failure to promote me.

D. X Other acts (Specify); False Charges.

The facts of my case are as follows: On Feb 18, 1982 false charge was brought against me. On March 14, 1982 I was prevented from working for an indefinite period. Dec. 10, 1986 dismissed in retaliation for filing against the company within the EEOC.

(Attach additional sheets as necessary.)

10. Defendant's conduct is discriminatory with respect to the following:

A. my race.

B. my color.

C. my gender (sex).

D. my religion.

E. X my national origin.

11. I believe that defendant(s) is/are still committing these acts against me. X Yes No.

12. A copy of the charge to the Equal Employment Opportunity Commission is attached to this complaint and is submitted as additional support of the facts of my claim.

13. If relief is not granted, plaintiff will be irreparably denied rights secured by Title VII of the 1964 Civil Rights Act, as amended.

14. Plaintiff has no adequate remedy at law to redress the wrongs described above.

WHEREFORE, Plaintiff prays that the Court grant such relief as may be appropriate, including injunctive orders, damages, costs and attorney's fees.

JOSE M. PERALES
849 Manida St.
Bronx, NY 10474
(212) 328-0407